

(5)  
No. 89-1850

Supreme Court, U.S.  
FILED

JUN 26 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989

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GEORGE M. & FERRELL S. HORN

PETITIONERS

v.

SMITH & MERONEY, a Professional  
Corporation, and ANNE E. MERONEY  
Individually

RESPONDENTS

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PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT AND COURT OF  
APPEALS OF GEORGIA

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REPLY BRIEF

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AND

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PETITION FOR WRIT OF CERTIORARI  
ON APPEAL  
TO THE SUPREME COURT OF GEORGIA

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REPLY BRIEF

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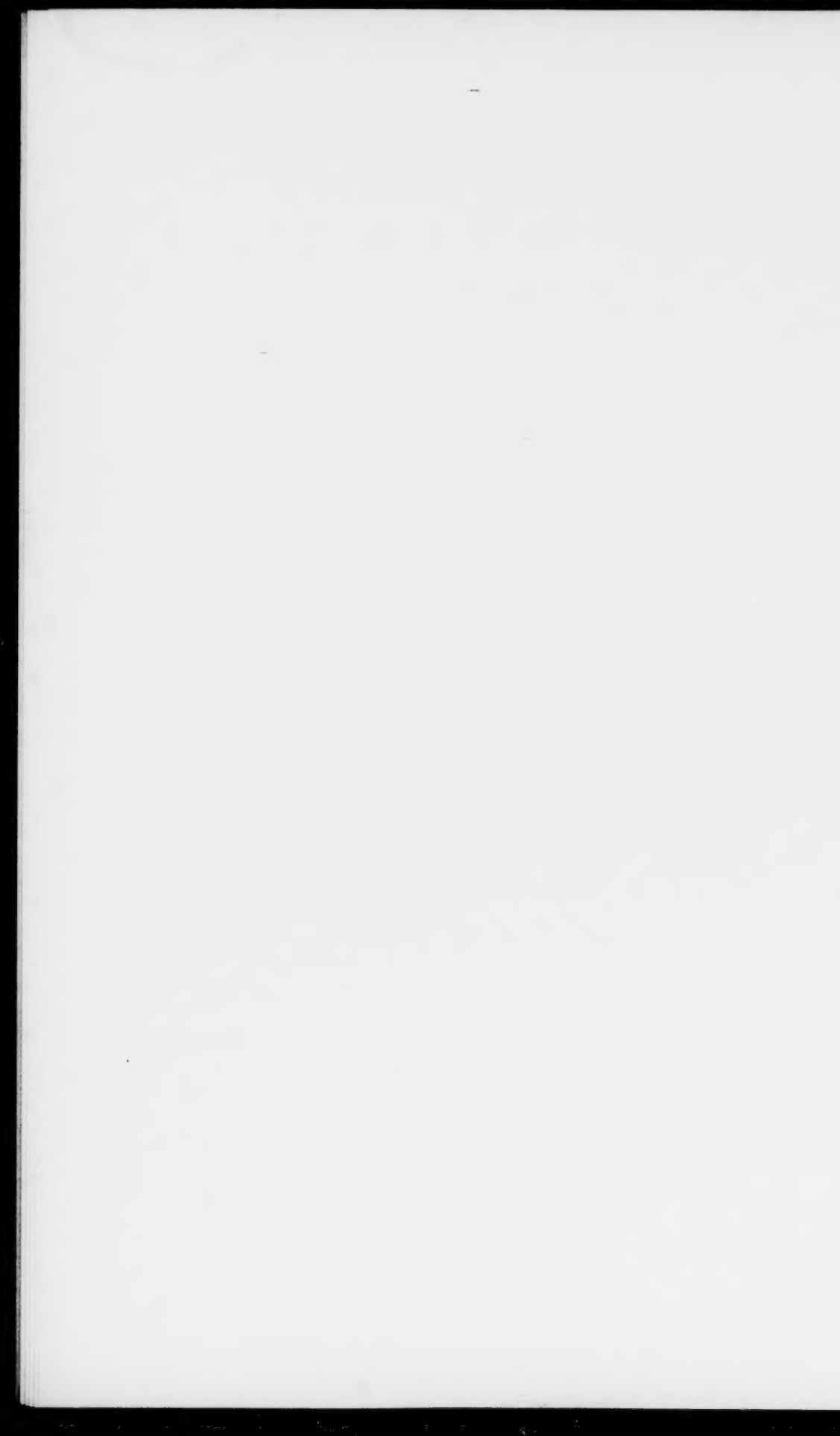
Respondents have incorrectly stated that decedant was participating in an air show. In fact the decedant was invited to ride in Mr. Claxton's unsafe airplane while Mr. Claxton participated in the air show. (Respondents Brief p.2).

Respondents state that their investigation of the wrongful death was thorough. Petitioners assert that this is highly suspect in view of the evidence presented by the Petitioners in their reply to Respondents motion for summary judgment as to the thoroughness of the investigation of the wrongful death case. The investigation was not thorough (Respondents Brief p.2)(R 282-292).

Respondents counsel state that Partitioners never asked Ms. Meroney or her firm to

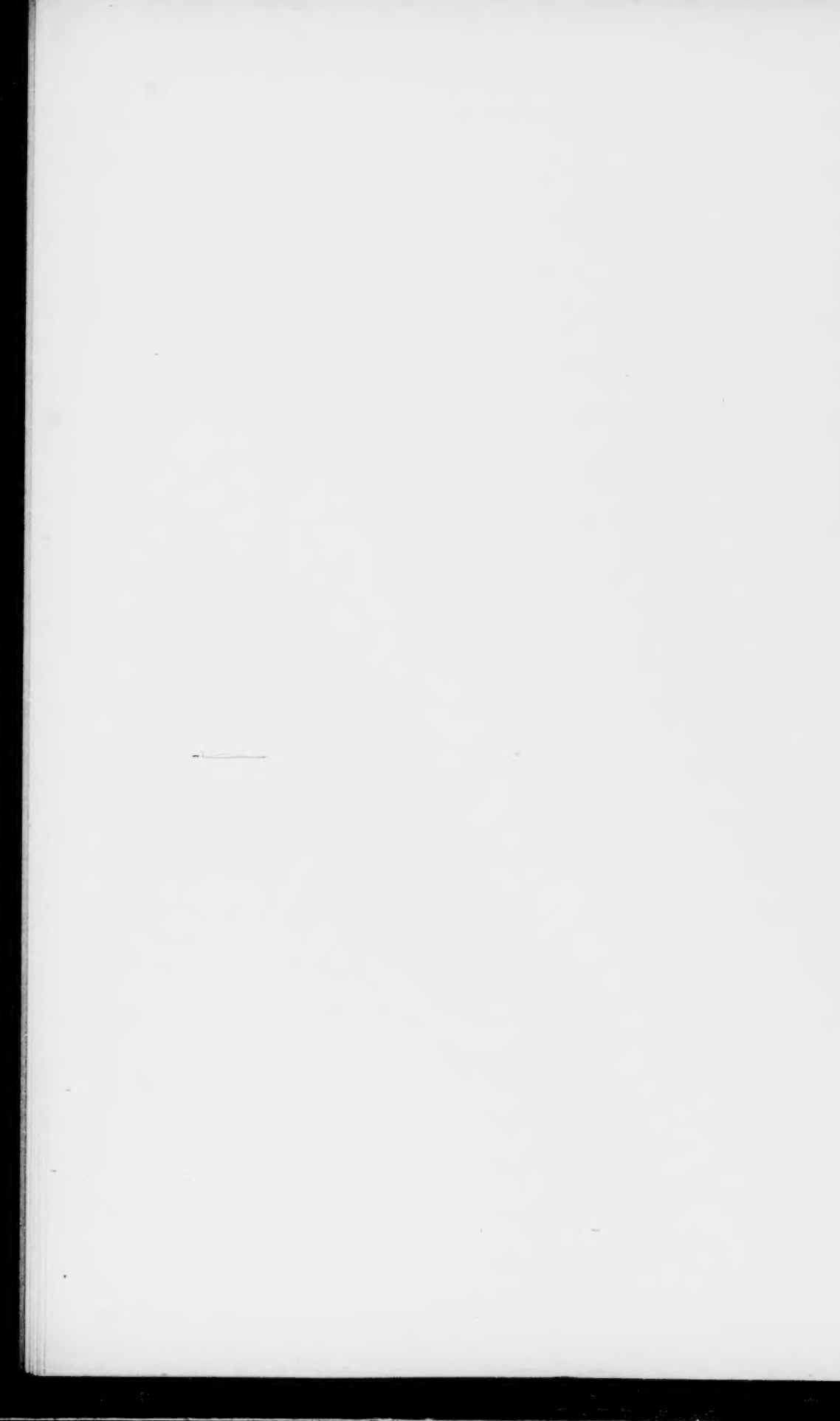


perform any legal services for them and had no contact with them relevant to the instant law suit. It is clear from the record that this is not correct. The record contains a letter to Mr. Joe Kothe from the Petitioners asserting their rights in the wrongful death of their son (R 353). The letter was forwarded as an attachment to a letter Mr. Kothe sent to Ms. Meroney concerning the estate of the decedant (R 351-352). Additionally, telephonic communication between Petitioners counsel, James Thompson, and Respondent Meroney (R 377-382) shows evidence of (1) Petitioners attorney's notification to the Respondent Meroney of the necessity to protect Petitioners legal rights in the wrongful death suit, as well as (2) collusion between Respondent and Petitioners counsel Thompson. Three days after his telephonic conversation with Meroney, Thompson dismissed Petitioners wrongful death suit with prejudice (R 402). Petitioners attorney told them that he would dismiss and their legal rights would be protected by the Respondents in the wrongful death suit



they, the Respondents, had filed in Georgia. Seven months later, Petitioners learned that the Alabama and Georgia wrongful death suits had been dismissed with prejudice for the paltry sum of \$100,000 (insurance proceeds). Then it was too late for Petitioners to file in the respective courts in order to protect their rights in the wrongful death suits. However, under the Alabama Code on wrongful death and descent and distribution, the Petitioners were provided with the right to bring the instant negligence suit against the Respondents in the Georgia courts.

In their brief, Respondents state that the Petitioners were represented by legal counsel consistently and independently at all times. Respondents further stated that Petitioners rights were protected by attorneys other than Respondents at all times. Both of these statements are incorrect. In fact what actually occurred was that Respondents would collude with Petitioners attorneys leaving them at critical times trying to protect their rights Pro Se (R 377-382, R 497).



Unfortunately, Petitioners found it necessary to file various proceedings against the administratrix, Anne Horn. The Respondents breached their contract with the administratrix in failing to collect for the full value of the decedant's life; failed to place the amount due for conscious pain and suffering, plus funeral expenses, into the estate for all legal heirs and additionally charged an exorbitant amount (\$42,000) for collecting an insurance policy; failed to pay decedant's debts (Petitioners educational loan) prior to filing a wrongful death suit as required by Georgia law.

Because Respondents did not act in good faith, competently and diligently with a reasonable degree of care and skill in protecting the legal rights of the decedant and all his legal heirs, this course of action for negligence was necessary.

Petitioners action alleging legal malpractice by the Respondents clearly raised questions of federal law. The trial court erred when it granted Respondents motion for





summary judgment, thus Petitioners were denied due process of law by the Georgia courts in violation of the United States Constitution.

Respondents misstated the fact concerning an affidavit by an expert. At the time of filing of the complaint for legal malpractice, by the Petitioners (June 9, 1987), there was no requirement for an affidavit from an expert witness for the Petitioners. In their reply to the Respondents motion for summary judgment, the Petitioners filed two affidavits supporting their assertion of malpractice (R-319-339).

Respondents Meroney's affidavit and that of her co-counsel were more than adequately rebutted by Petitioners(R-319-339). The presumption that the legal services were performed in an ordinarily skillful manner was properly rebutted by the affidavits submitted by Petitioners. There was therefore not sufficient justification for the granting of the motion for summary judgment.

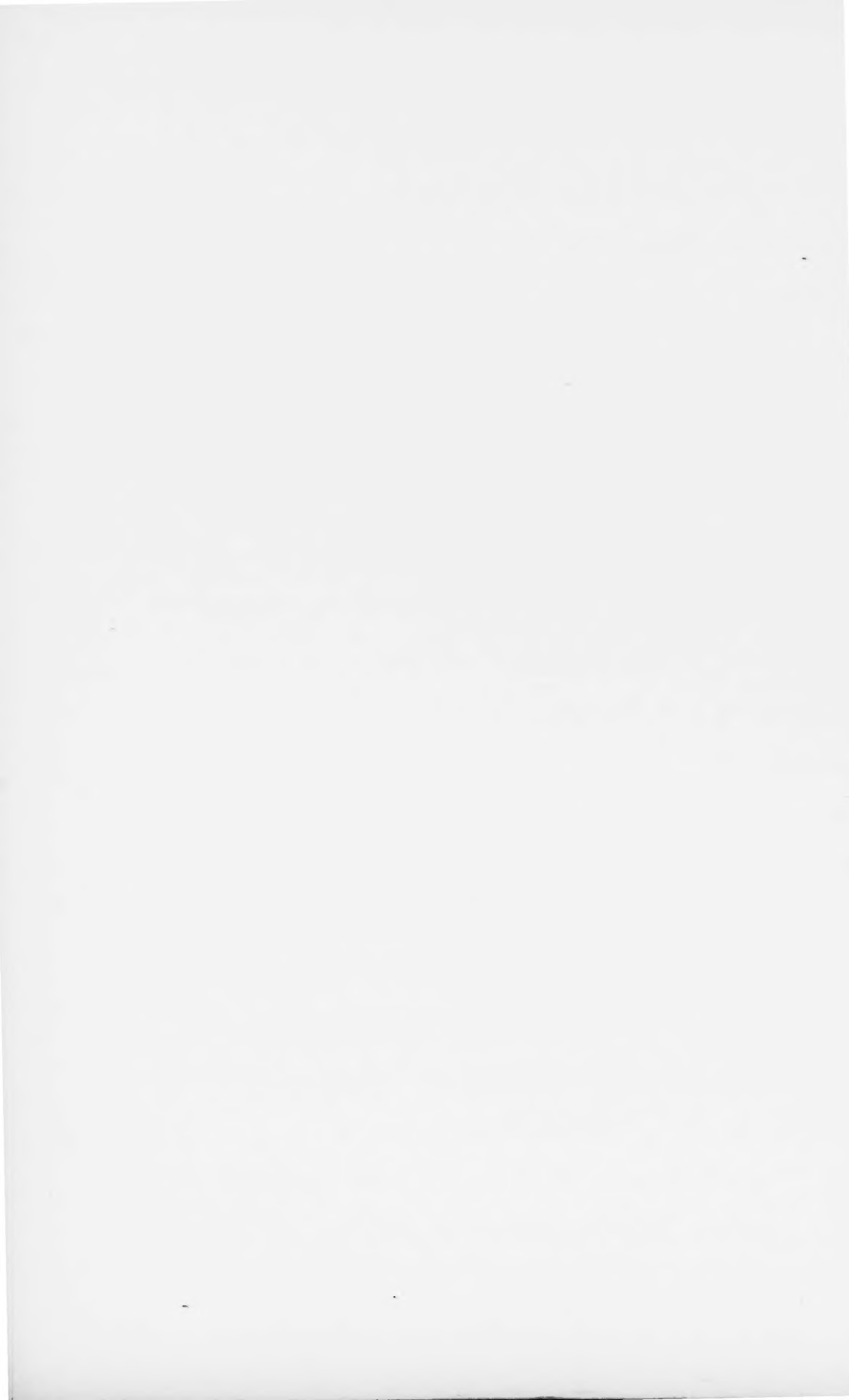
The two affidavits Respondents filed in support of the motion for summary judgment were affidavits by (1) the Respondent Meroney



and (2) the Respondents' co-counsel, Percilla. It is difficult to believe that either of the affidavits would be any different than the assertion that they did use due care. No attorney would admit that he erred in such a set of circumstances. To do so would be tantamount to admitting legal malpractice.

In the discussion on expert testimony, the ABA/BNA Lawyers Manual on Professional Conduct states, "The majority approach (by courts) is that expert testimony is required to establish a breach of the standard of care, unless the nature of the alleged breach is such as to be within the ordinary experience and understanding of laymen (Petitioners emphasis). This approach recognizes that some types of conduct are so obviously and flagrantly substandard as to render expert testimony superfluous and burdensome". ABA/BNA Lawyers Manual on Professional Conduct: Expert Testimony, 074-4050-84/80, p. 301: 126 (1984).

Petitioners submit that the examples of the type of investigation conducted by the

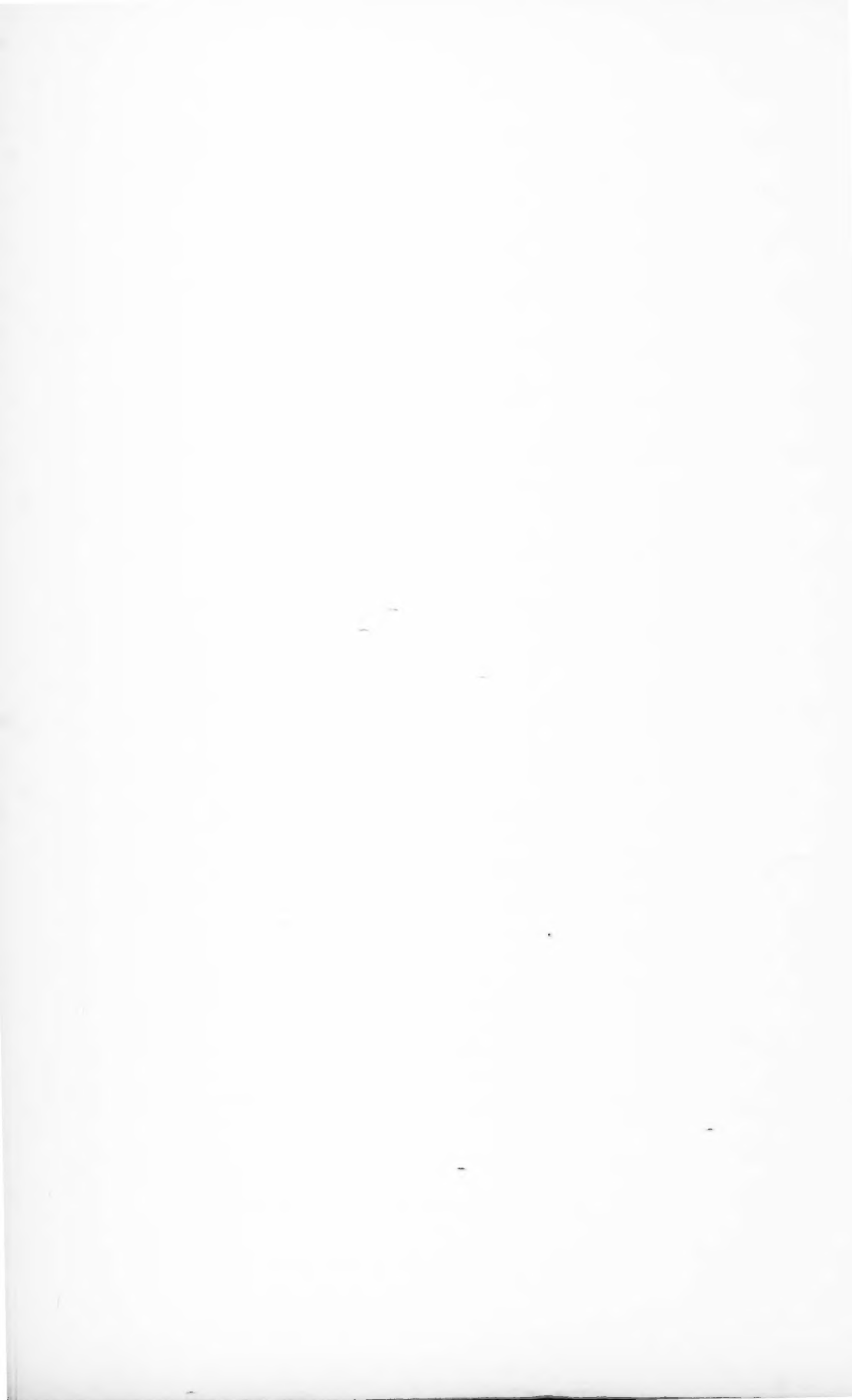


Respondent and her co-counsel are more than adequate to demonstrate their failure to use due care (R 282-292).

Petitioners have consistantly stated that no attorney/client relationship had existed between the Petitioners and the Respondents but under the concept of "lex loci delecti" and the Doctrine of Comity, the Respondents owed a duty of due care flowing through the administratrix to protect the interests of the legal heirs, Petitioners, and other beneficiaries (R 277-282). When the trial court found the Respondents acted with the requisite degree of care, skill and diligence, it apparently ignored the evidence submitted by the Petitioners thus violating the Due Process Clause of the 14th Amendment of the Constitution.

#### ARGUMENT

Petitioners were denied due process of law. The Georgia courts violated the Due Process Clause of the 14th Amendment of the Constitution when they granted Respondents motion for summary judgment and denied a petition for writ

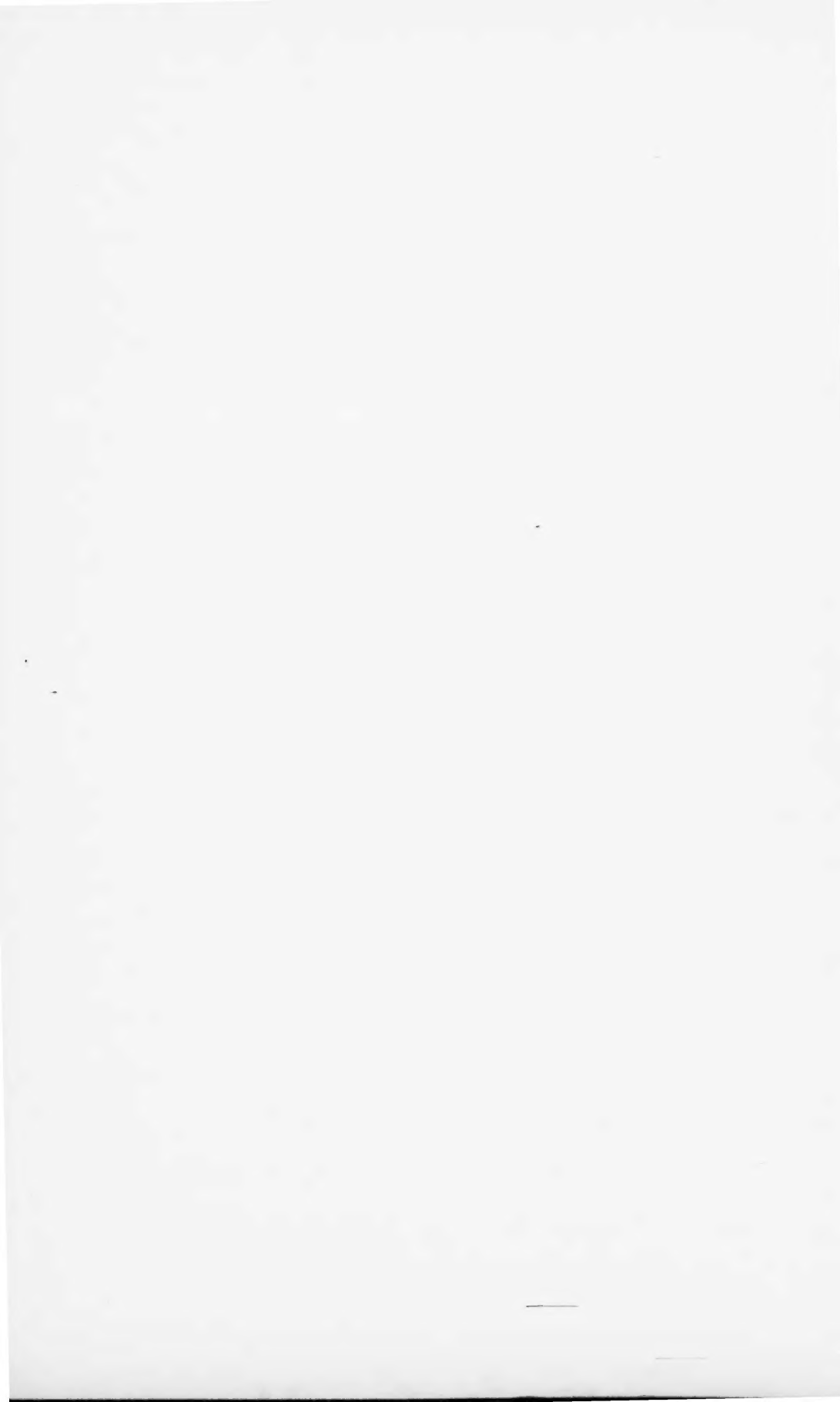


of certiorari. Respondents injured Petitioners by depriving them of property and engaging in willful and wanton negligence in their failure to get a judgment for the full value of the decedant's life, as well as, failing to apply the Wrongful Death and Descent and Distribution statutes of Alabama. Code of Alabama 1975, Section 6-5-410 (Wrongful Death) and Section 43-8-41 et seq (Descent and Distribution).

In the area of conflict of laws, the Due Process Clause prevents an arbitrary application of a state's jurisprudence to an out of state event. Pearson v. Northeast Airlines, Inc., US Ct of App, 2nd Ct. Nov. 8, 1962; 309 F 2d 553, 92 ALR 2d 1162.

Rule 10.1 of the Rules of this Court outlines the considerations governing the review on certiorari to a state court of last resort. The rule provides that a petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

There are special and important reasons for granting certiorari in this case. A state court had ignored an important question of federal





law, specifically, the conflict of laws between two states. Knight v. Wingate, 205 Ga. 133, 52 SE 2d 604 (1949). The issues involved have a continuing future consequence. Citizens of one state should not be ignored by the courts of another state simply because the courts do not desire to face the issues raised by the citizens of another state. This is especially true in the application of "lex loci delecti" and the Doctrine of Comity between sister states. . The issues of conflict of laws and the Due Process Clause of the 14th Amendment of the Constitution effects the citizens of every state of the union. The issues are not "narrow" or "episodic"but in fact are universal.

At the time of filing their complaint (June 9, 1987) there was not a statute in Georgia requiring expert testimony by the Petitioners. However, Petitioners did file two affidavits supporting their assertion of malpractice (R 319-339).

Further, the Georgia courts were in conflict with Georgia case law. Knight v. Wingate,



205 Ga. 133, 52 SE 2d 604 (1949)(See Contracts 187 (1) and the Due Process Clause of the 14th Amendment of the Constitution.

Respondents reference to the Georgia Code OCGA Section 9-11-9.1 brushes very quickly and lightly over the fact that the statute was effective on July 1, 1987 which was three weeks after the Petitioners filed their complaint.

Petitioners affidavits, filed on July 18, 1988 (R 319-339) carry as much weight as the affidavits of the two attorneys whose conduct is in question. The affidavits clearly are not objective and unbiased regarding their own investigative efforts (R 174-192).

When the concept of "lex loci delicti" and the Doctrine of Comity are applied under Alabama law (situs of the tort) and the Alabama Code for wrongful death and descent and distribution prevail, the Petitioners become heirs at law and beneficiaries with the right of action to bring suit against the Respondents who deprived them of property and wantonly neglected to handle the decedant's estate properly.



The trial court erred in granting Respondents motion for summary judgment on the basis of no issues of material fact. This action has merit to be heard by a jury especially when the trial court's order pointed out that the facts of the case are convoluted (R 558). Webster's New World Dictionary, 2nd Ed. p. 311, defines convoluted as, "extremely involved, intricate and complicated.

Because there is conflict of laws with regard to wrongful death and descent and distribution between the states of Alabama and Georgia, it is essential that a review of the factual record be carried out by the Court.

Petitioners insist that the choice of law issue and the deprivation of due process questions are meritorious. The choice of law on the underlying wrongful death action was relevant because the laws of Alabama, as the situs of the tort, must prevail and the Respondents had a duty of due care to Petitioners as heirs at law and beneficiaries of the decedant's estate.

By the Respondents making the decision



that Georgia law applied and the Georgia courts upheld that decision, the Respondents, and the Georgia courts, violated the Petitioners rights of due process under the 14th Amendment of the Constitution. The expert testimony just served to cover up the violation of Petitioners rights.

Respondents expert testimony, their own affidavits, obviously supported their contention that Georgia law, and not Alabama law, applied. Their testimonies presented through their own affidavits would hardly be anything but supportive since to testify any other way would destroy their own position.

It is apparent that genuine issues of material fact existed and the motion for summary judgment was improperly granted.

Finally the Petitioners were deprived of due process of law by the Georgia courts rulings because:

a. Alabama law must prevail because of "lex loci delicti" and the Doctrine of Comity. Southern R.R. Co. v. Decker, 5 Ga App 21, 62 SE 678 (1908); Gulf Col-lateral Inc. v. Morgan, 415 F. Supp. 319





(1976).

b. The Georgia courts ignored the existence of a conflict of laws between Georgia and Alabama. Code of Alabama 1975, supra, and Code of Georgia 1981, OCGA Section 51-4-1 (Wrongful Death) and Section 53-4-1 (Descent and Distribution).

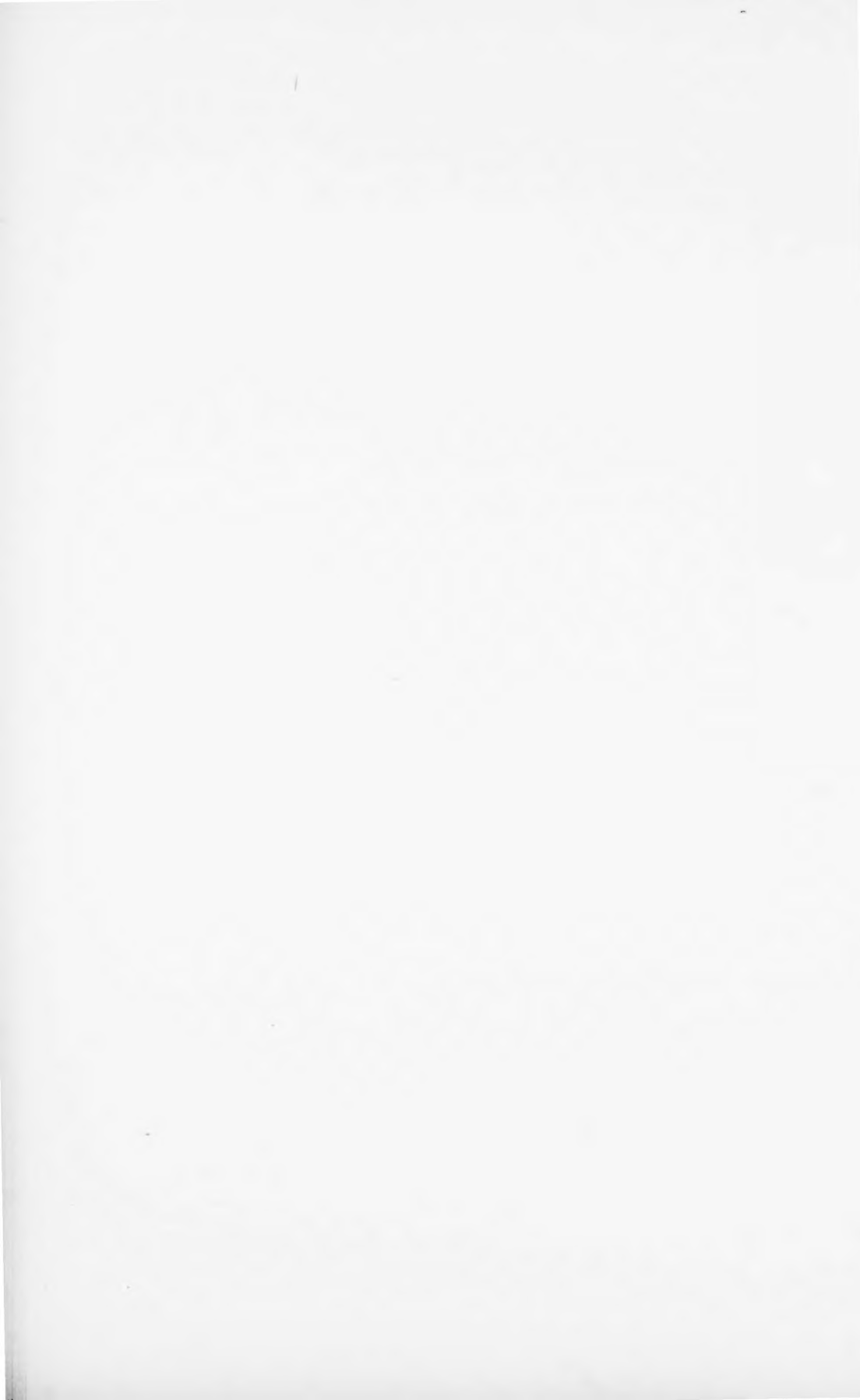
c. The charge of negligence of an attorney is a matter for a jury and the granting of a motion for summary judgment by the trial court was inappropriate and conflicted with Georgia case law. Wakefield v. A.R. Winter Company, 121 Ga. App. 259; 174 SE 2d 178 (1970); Ellington v. Tolar Construction Co. 237 Ga 235, 227 S.E. 2d 336 (1976).

The circumstances of this case amply justify the issuance of a writ of certiorari. Petitioners have been denied Due Process under the 14th Amendment of the Constitution.

### CONCLUSION

Petitioners reasons for the petition are as follows:

a. The courts of Georgia refused to ad-



dress the issues of "lex loci delicti" and the Doctrine of Comity thereby failing to impose "full faith and credit" of a sister state's statutes involving wrongful death and descent and distribution.

b. The courts of Georgia ignored the fact that a conflict of laws exists between two states and failed to determine and protect the interests of the legal heirs at law, residents of Alabama, when they granted a motion for summary judgment and denied a writ of certiorari to Petitioners.

c. The trial court granted a motion for summary judgment when the Petitioners alleged negligence by the Respondents; thus denying Petitioners the right to due process of law and conflicting with Georgia case law.

There is presented a special and important reason for review because such circumstances, as occurred in this case, do occur frequently in this age of mobility. It can and does happen in any of the states of the union.



The issue was addressed specifically as far back as 1908 in Southern RR v. Decker (supra) and as recently as 1976 in Gulf Collateral Inc. v. Morgan (supra) but the Respondents and the courts of Georgia failed to face the issue.

Because of the narrow view of the trial court and subsequent decisions by the appellate courts of Georgia, Petitioners have been denied their due process of law.

For these reasons, Petitioners pray this honorable Court to grant the instant petition for writ of certiorari.

Respectfully submitted,

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(Counsel of Record)

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*Susan Smitherson*

DATED: July 23, 1990

U.S. DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
LEE COUNTY, ALABAMA  
BY CLERK OF COURT JULY 22 1990



AFFIDAVIT

I, George M. Horn, hereby certify that I have presented this REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI under the authority of the United States Code, Title 28 Section 1257 and according to Rule 15 of the Rules of the Supreme Court of the United States. The statements made in this brief are made under the pains and penalties of perjury.

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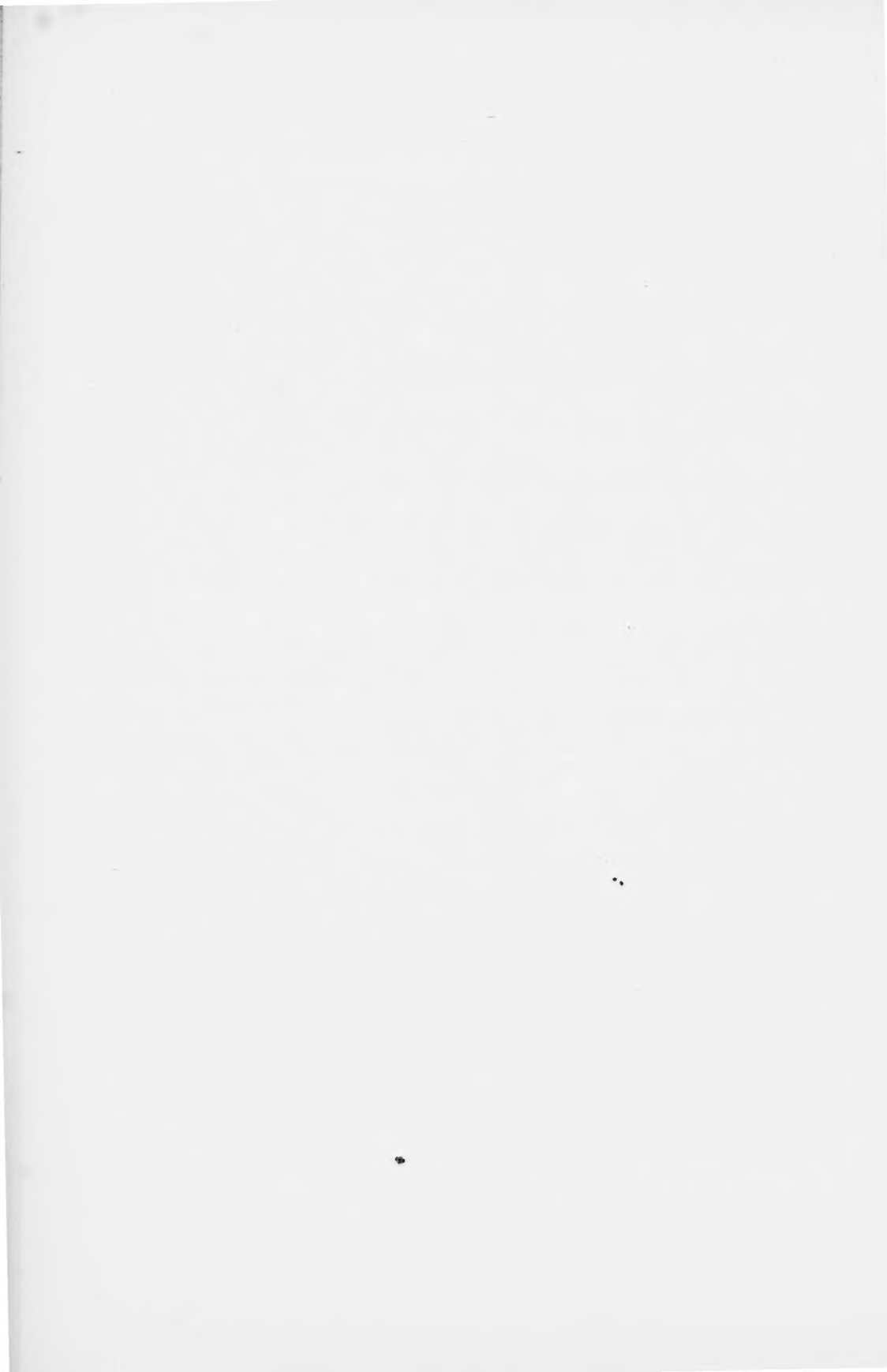
*Susan Ashler Smitherman*

SUSAN ASHLEY SMITHERMAN, NOTARY PUBLIC

LEE COUNTY, STATE OF ALABAMA

MY COMMISSION EXPIRES 11-22-93

Dated: July 23 1990





AFFIDAVIT

I, Ferrell S. Horn, hereby certify that I have presented this REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI under the authority of the United States Code, Title 28 Section 1257 and according to Rule 15 of the Rules of the Supreme Court of the United States. The statements made in this brief are made under the pains and penalties of perjury.

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Dated: July 21 1990



CERTIFICATE OF SERVICE

We, George M. Horn and Ferrell S. Horn,  
hereby certify that three true and correct cop-  
ies of the foregoing REPLY BRIEF have been  
served on:

Karen B. Bragman  
ARNALL, GOLDEN & GREGORY  
55 Park Place, Fourth Floor  
Atlanta, GA 30335

by depositing the same in the United States  
mail in a properly addressed envelope with  
sufficient postage.

This 23<sup>rd</sup> day of July 1990.

Respectfully submitted,

*George M. Horn*

George M. Horn, Pro Se

*Ferrell S. Horn*

Horn, Pro Se

SUSAN ASHLEY SMITHERMAN  
LEE COUNTY, STATE OF ALABAMA  
MY COMMISSION EXPIRES 12/22/93

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